

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SMITHKLINE BEECHAM CORPORATION,
d/b/a GLAXOSMITHKLINE,

Plaintiff,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-5702 CW

ORDER DENYING
DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A
MATTER OF LAW
(Docket No. 574)

In January 2014, the Ninth Circuit issued its opinion in Plaintiff GlaxoSmithKline's (GSK's) cross-appeal of the jury verdict in this case. The court held that a Batson¹ violation had occurred during jury selection and that, as a result, a new trial must be held. On July 10, 2014, it issued its mandate with respect to that decision. Defendant Abbott Laboratories has now renewed its motion for judgment as a matter of law. GSK opposes the motion. Having considered the papers filed by the parties and oral argument, the Court DENIES the motion for judgment as a matter of law. Docket No. 574.

BACKGROUND

Because the parties are intimately familiar with the facts of this case, the Court provides only the background necessary to resolve their motions.

I. Factual Background

Abbott and GSK manufacture and sell protease inhibitors (PIs), which are drugs used to treat human immunodeficiency

¹ Batson v. Kentucky, 476 U.S. 79 (1986).

1 virus (HIV) infection.

2 In 1996, Abbott introduced Norvir, which contained the active
3 ingredient ritonavir, as a stand-alone PI. After Norvir's
4 release, it was discovered that, when used in small quantities
5 with another PI, Norvir would "boost" the anti-viral properties of
6 that PI.

7 GSK desired to obtain a license from Abbott, "to promote and
8 market certain of GSK's HIV products with Ritonavir for the
9 purpose of co-prescription/co-administration" GSK's Trial
10 Ex. 5, License Agreement, at 0001. On December 13, 2002, Abbott
11 and GSK executed a "Non-Exclusive License Agreement," under which
12 Abbott granted GSK a license to "recommend, label, market, use,
13 sell, have sold and offer to sell one or more of the GSK Products,
14 but no other product, in co-prescription and/or co-administration
15 with Ritonavir" Id. at 0001 and 0005.

16 In 2003, GSK introduced Lexiva to the market. Although the
17 drug could be prescribed as a stand-alone PI, its daily dose was
18 less if it was administered along with Norvir. Abbott was aware
19 of studies that showed Norvir-boosted doses of Lexiva had efficacy
20 similar to Kaletra, another Abbott PI.

21 On December 3, 2003, Abbott raised the price of 100
22 milligrams of Norvir from \$1.71 to \$8.57, which amounted to a 400-
23 percent increase. This price hike commensurately increased the
24 cost of a boosted Lexiva therapy to some consumers.

25 II. Procedural and Trial History

26 GSK brought a claim against Abbott for allegedly breaching
27 the implied covenant of good faith and fair dealing associated
28 with the parties' December 2002 agreement, as well as claims under

1 the Sherman Act and North Carolina's Unfair and Deceptive Trade
2 Practices Act (UDTPA). These claims were tried to a jury. At the
3 close of evidence, Abbott moved under Rule 50(a) for judgment as a
4 matter of law on all of GSK's claims. The Court did not grant
5 Abbott's motion and submitted the case to the jury.

6 In accordance with the jury's verdict, judgment was entered
7 in favor of GSK on its implied covenant claim and in favor of
8 Abbott on GSK's other claims. GSK was awarded \$4,549,590.96,
9 which was the sum of \$3,486,240.00 and interest provided under New
10 York law. After judgment, Abbott filed a renewed motion for
11 judgment as a matter of law pursuant to Rule 50(b) on GSK's claim
12 for breach of the implied covenant of good faith and fair dealing,
13 the only claim on which the jury found for GSK. GSK opposed the
14 motion and the Court denied it.

15 On October 3, 2011, Abbott filed a notice of appeal and, the
16 next day, GSK filed its cross-appeal. On January 14, 2014, the
17 Ninth Circuit issued an opinion, holding that Abbott's use of a
18 peremptory strike against the only identifiable gay member of the
19 venire violated Batson. Accordingly, the Ninth Circuit remanded
20 the case for a new trial. SmithKline Beecham Corp. v. Abbott
21 Labs, 740 F.3d 471 (9th Cir. 2014). In reaching this decision,
22 the panel also held that this Court did not err in denying
23 Abbott's Rule 50(b) motion for judgment as a matter of law on
24 GSK's contract claim and that it "need not consider whether the
25 district court erred in submitting the UDTPA and antitrust claims
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1 to the jury." Id. at 488 n.8. Abbott has now renewed its Rule 50
2 motion with respect to the UDTPA and antitrust claims.²

3 LEGAL STANDARD

4 Rule 50(a)(1) of the Federal Rules of Civil Procedure
5 provides,

6 If a party has been fully heard on an issue during a
7 jury trial and the court finds that a reasonable jury
8 would not have a legally sufficient evidentiary basis to
9 find for the party on that issue, the court may: (A)
10 resolve the issue against the party; and (B) grant a
motion for judgment as a matter of law against the party
on a claim or defense that, under the controlling law,
can be maintained or defeated only with a favorable
finding on that issue.

11 Fed. R. Civ. P. 50(a)(1). The standard for judgment as a matter
12 of law mirrors that for granting summary judgment. Reeves v.
13 Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-50 (2000).
14 "[I]n entertaining a motion for judgment as a matter of law, the
15 court . . . may not make credibility determinations or weigh the
16 evidence." Id. at 149. Rather, the court "must view the evidence
17 in the light most favorable to the nonmoving party . . . and draw
18 all reasonable inferences in that party's favor." Josephs v. Pac.
19 Bell, 443 F.3d 1050, 1062 (9th Cir. 2006). "A district court can
20 grant a Rule 50(a) motion for judgment as a matter of law only if
21 there is no legally sufficient basis for a reasonable jury to find

22 ² In its motion, Abbott states that it seeks to renew its
23 Rule 50(b) motion. However, Rule 50(b) provides that, if a trial
24 court does not rule on a party's Rule 50(a) motion for judgment as
25 a matter of law and instead submits the action to the jury, the
26 moving party may make a renewed motion for judgment as a matter of
27 law to be filed within twenty-eight of entry of judgment. Here,
28 the Ninth Circuit has vacated the jury's verdict and the
subsequent judgment. Accordingly, the Court will interpret
Abbott's motion as a renewal of its Rule 50(a) motion for judgment
of law prior to submission of the action to the jury.

1 for that party on that issue.” Krechman v. Cnty. of Riverside,
2 723 F.3d 1104, 1109 (9th Cir. 2013) (internal quotation marks
3 omitted).

4 DISCUSSION

5 I. Propriety of Abbott’s Rule 50 Motion

6 As an initial matter, GSK argues that Abbott’s motion for
7 judgment as a matter of law is procedurally improper. GSK first
8 argues that a Rule 50(b) motion must be filed within twenty-eight
9 days after the entry of judgment and Abbott’s motion is therefore
10 untimely. However, as discussed above, the Court construes
11 Abbott’s motion to be a Rule 50(a) motion.

12 Citing Ayala v. Wong, 756 F.3d 656 (9th Cir. 2014), GSK next
13 argues that it is entitled to a new trial on all remaining claims
14 because the previous trial was tainted by the structural error of
15 the Batson violation. Abbott counters that other cases, such as
16 Montiel v. Los Angeles, 2 F.3d 335 (9th Cir. 1993), permit it to
17 renew its Rule 50 motion. The Court finds that none of the cases
18 cited by the parties is controlling. Ayala considered whether
19 structural error occurred in the context of a petition for a writ
20 of habeas corpus where defense counsel was excluded from Batson
21 proceedings. 756 F.3d at 673. Montiel did not address the
22 question of whether a new motion for judgment as a matter of law
23 can be made on remand when a Batson violation is found. Rather,
24 it found a Batson violation and, in an unrelated discussion,
25 reversed in part the district court’s findings on a motion for
26 judgment as a matter of law and remanded that motion to the
27 district court for the consideration of other issues. 2 F.3d at
28 343. However, the Court need not decide whether this motion is

1 properly made at this time, because it denies Abbott's motion on
2 all grounds.

3 II. Antitrust Claim

4 Abbott argues that GSK's antitrust claim fails as a matter of
5 law. Section 2 of the Sherman Act "makes it unlawful to
6 monopolize, or attempt to monopolize, . . . any part of the trade
7 or commerce among the several States." Pac Bell Tel. Co. v.
8 linkLine Communs., Inc., 555 U.S. 438, 448 (2009). To establish
9 liability for a monopolization claim, GSK must prove "(1) the
10 possession of monopoly power in the relevant market and (2) the
11 willful acquisition or maintenance of that power as distinguished
12 from growth or development as a consequence of a superior product,
13 business acumen, or historic accident." Eastman Kodak Co. v.
14 Image Tech. Servs., Inc., 504 U.S. 451, 480 (1992). Abbott argues
15 that GSK failed to present a legally sufficient evidentiary basis
16 for a reasonable jury to find for GSK as to either element of a
17 monopolization claim. Moreover, Abbott argues that GSK failed to
18 rebut its evidence of a legitimate business justification for its
19 decision to increase the price of Norvir.

20 A. Monopoly Power

21 Abbott first argues that GSK has failed to demonstrate that
22 Abbott had monopoly power in the market in which Kaletra competes.
23 Abbott contends that (1) GSK failed to prove that it properly
24 defined the relevant market; (2) GSK failed to prove that Abbott
25 maintained a dominant market share; and (3) GSK failed to prove
26 sufficient barriers to entry or expansion in the market.

1 1. Relevant Market

2 Abbott argues that GSK's antitrust claim fails because it
3 relies upon an unduly narrowly defined market. "A relevant
4 market, for antitrust purposes, can be broadly characterized in
5 terms of the cross-elasticity of demand for or reasonable
6 interchangeability of a given set of products or services." Coal.
7 for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 507
8 (9th Cir. 2010) (citations and internal quotation marks omitted).
9 Courts "consider whether the product and its substitutes are
10 reasonably interchangeable by consumers for the same purpose, as
11 well as industry or public recognition of the submarket as a
12 separate economic entity, the product's peculiar characteristics
13 and uses, unique production facilities, distinct customers,
14 distinct prices, sensitivity to price changes, and specialized
15 vendors." Id. (citations omitted). The Ninth Circuit has held
16 that "what constitutes a relevant market is a factual
17 determination for the jury." Image Tech. Servs. v. Eastman Kodak
18 Co., 125 F.3d 1195, 1203 (1997).

19 At trial, GSK's theory relied upon a "highly effective PI
20 market," which it defined as Kaletra and two other drugs, Lexiva
21 and Reyataz, when boosted by Norvir. GSK's expert, Dr. Roger
22 Noll, testified that these drugs constitute the relevant market
23 because they are "close therapeutic substitutes" and "economic
24 substitutes." Tr. Tran. 1553:12-1554:12. Abbott criticizes Dr.
25 Noll's testimony on several grounds and simply states that "no
26 reasonable jury could have accepted this contrived definition--let
27 alone based on the testimony of GSK's Dr. Noll, who admitted that
28 he has no medical or pharmacological expertise, has no experience

1 in drug pricing or drug competition, and did not consult with
2 independent physicians to inform his analysis.” Docket No. 574 at
3 10 (citations omitted). However, when considering a JMOL, the
4 Court may not make credibility determinations and must view the
5 evidence in the light most favorable to the non-moving party.

6 Abbott also criticizes GSK’s definition of the relevant
7 market because it contends other drugs are interchangeable with
8 Kaletra. However, GSK’s medical expert, Dr. Javeed Siddiqui,
9 testified as to the lack of interchangeability between the other
10 drugs and Kaletra.

11 Because the Court finds that GSK presented sufficient
12 evidence for a reasonable jury to find that there was adequate
13 interchangeability between the products included in its definition
14 of the relevant market, it need not reach Abbott’s arguments with
15 respect to cross-elasticity. The Court denies Abbott’s motion for
16 judgment as a matter of law on this ground.

17 2. Dominant Market Share and Barriers to Entry

18 Relying on United States v. Syufy Enterprises, 903 F.2d 659
19 (9th Cir. 1990), Abbott argues that evidence of its market share
20 decline from eighty-one percent to below fifty percent over a
21 three-year period establishes, as a matter of law, that it did not
22 possess monopoly power over the market. In Syufy, the Ninth
23 Circuit concluded that, even though a firm had a large market
24 share, its inability to maintain that share demonstrated a lack of
25 monopoly power. Id. at 666. As this Court noted in its order on
26 the summary judgment motions, Syufy is, at least in part,
27 distinguishable from the instant case because there were no
28 substantial barriers to entry in that case. Id. at 666-67. In

1 this case, GSK presented evidence of significant barriers to entry
2 including obtaining patents, investing in research and
3 development, obtaining FDA approval and depending on Abbott's
4 control over Norvir. Tr. Tran. 1583:15-1585:7. Abbott further
5 argues that the Ninth Circuit has "expressed doubt that 50% share
6 of the market is sufficient to establish monopoly power per se."
7 Greyhound Computer Corp., Inc. v. IBM Corp., 559 F.2d 488, 496
8 n.18 (9th Cir. 1977). However, as discussed above, GSK presented
9 other evidence of monopoly power, so there is no need for a per se
10 finding.

11 Finally, Abbott cites Rebel Oil Co., Inc. v. Atlantic
12 Richfield Co. for the proposition that, where rivals "can quickly
13 respond to any predator's attempt to raise prices above
14 competitive levels, the predator will suffer an immediate loss of
15 market share," indicating that "the predator does not have market
16 power." 51 F.3d 1421, 1441 (9th Cir. 1995). However, Rebel Oil
17 is factually distinguishable from the instant case. In Rebel Oil,
18 the Ninth Circuit addressed a claim of predatory pricing among gas
19 stations. Predatory pricing occurs when a defendant engages in a
20 "price war" by "set[ting] prices below its marginal cost hoping to
21 eliminate rivals and increase its share of the market" then
22 charges "supracompetitive prices--prices above competitive
23 levels." Id. at 1433-34. In such situations, competitors'
24 ability quickly to expand their output will undercut the
25 defendant's ability to "recoup the losses suffered during the
26 price war" and undermines a finding of predatory pricing. Id. at
27 1434. In contrast to the gas stations in Rebel Oil, where other
28 companies could expand their operations to build new stations to

1 draw business away from the defendant, GSK and Abbott's other
2 competitors had to buy Norvir to boost their products. Therefore,
3 GSK and Abbott's other competitors could not simply increase their
4 production to draw business away from Abbott when Abbott increased
5 the price of Norvir.

6 Accordingly, the Court denies Abbott's motion for judgment as
7 a matter of law on this ground.

8 B. Anticompetitive Conduct

9 As stated above, in addition to demonstrating monopoly power,
10 GSK must establish anticompetitive conduct. Abbott argues that
11 GSK failed to present sufficient evidence to permit a reasonable
12 jury to find anticompetitive conduct on either of its theories,
13 (1) a violation of a duty to deal, or (2) predatory pricing
14 through bundled-product discounting.

15 1. Duty to Deal

16 "As a general rule, businesses are free to choose the parties
17 with whom they will deal, as well as the prices, terms, and
18 conditions of that dealing." linkLine, 555 U.S. at 448. However,
19 there are "limited circumstances in which a firm's unilateral
20 refusal to deal with its rivals can give rise to antitrust
21 liability." Id. (citing Aspen Skiing Co. v. Aspen Highlands
22 Skiing Corp., 472 U.S. 585 (1985)). A refusal to deal might take
23 the form of (1) "the unilateral termination of a voluntary and
24 profitable course of dealing;" (2) "an offer to deal with a
25 competitor only on unreasonable terms and conditions," which could
26 "amount to a practical refusal to deal;" and (3) a refusal to
27 provide competitors with "products that were already sold in a
28 retail market to other customers." MetroNet Services Corp. v.

1 Qwest Corp., 383 F.3d 1124, 1132-34 (9th Cir. 2004). "[A]
2 willingness to forsake short-term profits to achieve an
3 anticompetitive end" is evidence of an anticompetitive refusal to
4 deal. Id. at 1131 (quoting Verizon Communs., Inc. v. Law Offices
5 of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004)). Accordingly,
6 a decision to alter a course of dealing together with evidence of
7 "anticompetitive malice" is evidence of a refusal to deal. Id. at
8 1132.

9 At trial, GSK presented evidence that, prior to the 2003
10 price increase, Abbott had a pattern of licensing Norvir and
11 increasing the price only at the rate of inflation. In contrast,
12 the December 2003 400-percent price increase caused the cost of
13 GSK's boosted Lexiva-based therapy to increase by seventy-one
14 percent. In addition, GSK presented evidence of "anticompetitive
15 malice" including a presentation recommending delaying the
16 announcement of the price increase to be "simultaneous with" the
17 launch of Lexiva and calling the plan a "clever creative way to
18 make [GSK] look bad." P-0081. GSK also presented an email sent
19 shortly after the price increase, from the President of Abbott's
20 United States Pharmaceutical Products Division to a group of
21 individuals responsible for the price increase, stating,
22 "Congratulations to the A Team. You folks are fantastic. It's
23 too bad you're giving a lump of coal to BMS and GSK for the
24 holidays, but such is life." P-0245-0002. GSK introduced another
25 email from the same individual discussing a "RTV supply constraint
26 program." P-0157-0003. This evidence, combined with the sudden
27 price increase, was sufficient to allow a reasonable jury to find
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1 in GSK's favor on its duty to deal claim.³ Accordingly, the Court
2 denies Abbott's motion for judgment as a matter of law on this
3 ground.

4 2. Bundled Discounting

5 Abbott next argues that it is entitled to judgment as a
6 matter of law on GSK's bundled discounting claim. "Bundling is
7 the practice of offering, for a single price, two or more goods or
8 services that could be sold separately. A bundled discount occurs
9 when a firm sells a bundle of goods or services for a lower price
10 than the seller charges for the goods or services purchased
11 individually." Cascade Health Solutions v. PeaceHealth, 515 F.3d
12 883, 894 (9th Cir. 2008). "[B]undled discounts, while potentially
13 procompetitive by offering bargains to consumers, can also pose
14 the threat of anticompetitive impact by excluding less diversified
15 but more efficient producers." Id. at 897. Under Cascade, a
16 bundled product can be found to cause an antitrust violation if
17 the competitive component of the bundled product is deemed, under
18 the "discount attribution standard," to be sold below cost, even
19 though the bundle as a whole is priced above cost. 515 F.3d at
20 906.

21 At trial, GSK's economic expert, Dr. Keith Leffler, opined
22 that Kaletra is a bundled product of lopinavir and Norvir. He
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24 ³ Abbott asserts that, in order to prevail on its duty to
25 deal claim, GSK must also establish that Abbott made a short-term
26 profit sacrifice as a result of the price increase. However, as
27 GSK points out, the Court has previously found that "short-term
28 sacrifice is not an element of a Section 2 claim, but rather a
means to show anticompetitive motives." Docket No. 195 at 16.
Here, there is other evidence of anticompetitive malice.

1 further opined that Abbott sold the lopinavir component of Kaletra
2 below its average variable cost. Abbott criticizes Dr. Leffler's
3 methodology on two grounds. First, it asserts that Dr. Leffler
4 improperly excluded Abbott's sales of lopinavir to public entities
5 when calculating the imputed price of the drug.⁴ Second, it
6 asserts that Dr. Leffler improperly included fixed costs in his
7 calculations to increase the average variable cost. However, as
8 GSK points out, Dr. Leffler explained his reasons for limiting his
9 analysis to private sector pricing and for the inclusion of
10 certain costs in his average variable cost analysis. See, e.g.,
11 Tr. Tran. 1290:19-1291:14. Moreover, Dr. Leffler's testimony was
12 subject to cross-examination and Abbott had the opportunity to
13 present the testimony of its own expert, Dr. Richard Gilbert. As
14 discussed above, when considering a JMOL, the Court may not make
15 credibility determinations and must view the evidence in the light
16 most favorable to the non-moving party. Accordingly, the Court
17 denies Abbott's motion for judgment as a matter of law on this
18 ground.

19 C. Legitimate Business Justification

20 Abbott argues that GSK failed to present evidence to rebut
21 Abbott's legitimate business justification of profiting from its
22 intellectual property rights in Norvir. "When a legitimate
23 business justification supports a monopolist's exclusionary
24 conduct, that conduct does not violate § 2 of the Sherman Act."

26 ⁴ Abbott's price increase on Norvir applied only to consumers
27 with private insurance; those purchasing Norvir through public
28 programs, such as Medicare, were not subject to the increase
because of government pricing rules.

1 Image Tech. Servs., 125 F.3d at 1212. In the Ninth Circuit, a
2 defendant's "desire to profit from its intellectual property
3 rights justifies its conduct, and the jury should presume that
4 this justification is legitimately procompetitive." Id. at 1219.
5 However, the presumption is rebuttable. Whether valid business
6 reasons motivated a monopolist's conduct is a question of fact.
7 High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990
8 (9th Cir. 1993) (citing Eastman Kodak Co., 504 U.S. at 483-84;
9 Aspen Skiing Co., 472 U.S. at 604-05).

10 As discussed above, GSK presented evidence that the price
11 increase was timed to disrupt the launch of Lexiva. In addition,
12 GSK presented other evidence that, in response to concerns that
13 competitors were taking market share from Kaletra, Abbott was
14 considering either pulling Norvir from the market or implementing
15 the price increase at issue in this case. Based on this evidence,
16 a reasonable jury could find that Abbott's purported legitimate
17 business justification was pretextual. Accordingly, the Court
18 denies Abbott's motion for judgment as a matter of law on this
19 ground.

20 III. UDTPA Claim

21 Abbott argues that it is entitled to judgment as a matter of
22 law on GSK's UDTPA claim to the extent it is based on a breach of
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1 contract.⁵ Abbott's argument is based on Bumpers v. Community
2 Bank of Northern Virginia, a recent case in which the North
3 Carolina Supreme Court held that the UDTPA "has long encompassed
4 conduct tantamount to fraud, which requires reliance." 367 N.C.
5 81, 82 (2013). Abbott argues that GSK's UDTPA claim must fail
6 because GSK failed to present evidence of reliance on a
7 misrepresentation. However, as GSK pointed out at the hearing,
8 "in assessing whether particular conduct violates the UDTPA,
9 either unfairness or deception can bring conduct within the
10 purview of the statute; an act need not be both unfair and
11 deceptive." South Atlantic Ltd. P'Ship of Tenn. v. Riese, 284
12 F.3d 518, 535 (4th Cir. 2002) (internal quotation marks omitted);
13 see also Rucker v. Huffman, 99 N.C. App. 137, 141 (1990). As
14 Abbott concedes, Bumpers is applicable to cases in which "the
15 allegations address misrepresentations." Docket No. 574 at 24.
16 To the extent GSK's UDTPA claim is based on a breach of contract,
17 it is based, at least in part, on unfair conduct rather than
18 misrepresentations or deceptive conduct. Accordingly, the Court
19 denies Abbott's motion for judgment as a matter of law on GSK's
20 UDTPA claim.

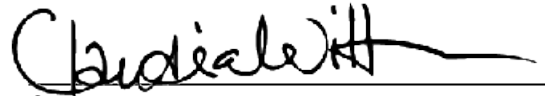
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24 ⁵ GSK notes and Abbott does not dispute that, if the Court
25 denies Abbott's motion for judgment as a matter of law on GSK's
26 antitrust claims, Abbott's motion for judgment as a matter of law
27 on its UDTPA claim must likewise be denied because antitrust
28 liability is sufficient to establish UDTPA liability. See Docket
No. 325 at 44 n.10. Nonetheless, Abbott seeks judgment as a
matter of law on GSK's UDTPA claim to the extent it is based on a
breach of contract.

CONCLUSION

For the foregoing reasons, the Court DENIES Abbott's motion
for judgment as a matter of law.

IT IS SO ORDERED.

Dated: November 24, 2014


CLAUDIA WILKEN
United States District Judge